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No. 80-293

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITEX LIMITED, ET AL., PETITIONERS

v.

DAN RIVER, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a company, whose stock allegedly is being acquired without proper disclosure in violation of Section 13(d) of the Securities Exchange Act of 1934, may bring an action for equitable relief against the acquiring person.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d), generally requires that a person who acquires the beneficial ownership of more than five percent of any class of equity security registered with the Securities and Exchange Commission and a national stock exchange under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*, must, within ten days of such acquisition, send to the issuer of the securities, to each stock exchange where the securities are traded, and to the Commission a report containing information concerning the acquiring party and the transactions involved.[1] The purpose of this disclosure is to give reliable information to corporations, their shareholders, and potential investors, so that those persons can evaluate the significance of a large change in the holding of the company's stock.

Respondent Dan River, Inc. ("Dan River") filed this suit against petitioner Unitex Limited ("Unitex") in the United States District Court for the Eastern District of Virginia seeking equitable relief under Section 13(d) of the Act. Dan River alleged, *inter alia*, that in late 1978 Unitex began acquiring the stock of Dan River, that Unitex's holdings grew to more than five percent of the stock, and that a Schedule 13D filed by Unitex in February 1979 failed to disclose certain required information (Pet. App.

[1] Commission Rule 13d-1 sets forth the information required to be disclosed in a form captioned Schedule 13D. See 17 C.F.R. 240.13d-1.

2a-5a). On February 23, 1979, the district court entered a temporary restraining order barring Unitex from acquiring additional shares of Dan River stock until the earlier of March 30, 1979, or twenty-four hours after the filing of an amended Schedule 13D containing additional specified information (*id.* at 6a). On March 1, 1979, Unitex filed an amended Schedule 13D and also filed a motion to dismiss the complaint on grounds of mootness (*id.* at 6a-8a). On March 2, 1979, Dan River amended its complaint to allege that the amended schedule also was false and misleading (*id.* at 8a-9a). That same day, however, the district court vacated the temporary restraining order. It subsequently dismissed the complaint on mootness grounds without addressing the question whether an issuer corporation has standing to sue for equitable relief under Section 13(d) (*id.* at 24a-31a).

On appeal, the court of appeals held that an issuer "has a right to seek equitable relief" under Section 13(d) (Pet. App. 15a). It reversed the district court's dismissal of the complaint and remanded with instructions that the parties be permitted to engage in limited discovery and offer additional proof respecting the accuracy and completeness of a portion of the Schedule 13D filed by Unitex (*id.* at 22a-23a). In remanding the case for further proceedings, the court of appeals noted (*id.* at 20a-21a):

> In reviewing the record of this case, we emphasize that we are not holding that the defendants' Schedule 13D is actually false, incomplete, or misleading. * * * We simply conclude that Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the

> parties into the defendants' purpose in purchasing large amounts of Dan River stock. Because, as one court has stated, "a false filing may be more detrimental to the informed operation of the securities markets than no filing at all," * * * a court simply cannot turn a blind eye to a potentially inaccurate filing when it possesses the injunctive power to have that filing corrected before irreparable harm occurs to the investing public. * * * This does not mean that the plaintiff may use the discovery processes to harass the defendants or needlessly delay the resolution of this controversy. The district court is * * * perfectly competent to keep the discovery within the range of relevancy and to prevent the use of the court's processes for delay.

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Moreover, as petitioner concedes (Pet. 7), the decision is consistent with the decisions of every court of appeals that has examined the question. The decision is also interlocutory and does not pass on the merits of the complaint or the appropriateness of equitable relief in the circumstances of this case. Review by this Court at this time is therefore unwarranted.

1. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), is the only decision of this Court directly involving a private suit for equitable relief under Section 13(d). As the Court explained in *Rondeau*, however, "neither the availability of a private suit under the Williams Act nor [the issuer's] standing to bring it has been questioned here" (422 U.S. at 62). The narrow question before the Court in *Ron-*

deau was whether the issuer was entitled to injunctive relief to remedy a Section 13(d) violation *after* the acquiring party had complied with the statutory reporting requirements. Thus, the Court had no occasion to decide "whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is currently in violation of § 13(d) * * * pending compliance with the reporting requirements" (422 U.S. at 59 n.9).[2]

The decision in this case, recognizing a limited remedy for an issuer corporation seeking equitable relief to obtain compliance with the statute's filing requirement, plainly does not conflict with *Rondeau*, as the court of appeals explained (see Pet. App. 11a-13a & n.5). In recognizing this limited remedy, the court of appeals followed the consistent line of decisions of the other courts of appeals that have considered the question, including the Second Circuit's leading decision in *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719-721 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972). See Pet. App. 12a-15a.[3]

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[2] The Court held in *Rondeau* that a showing of irreparable harm must be made before a private litigant may obtain injunctive relief in a suit under Section 13(d). The issuer's inability to make that showing after the acquiring party had complied with the statute barred the injunctive remedy sought by the complaint. 422 U.S. at 64-65.

[3] Accord: *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F.2d 240, 248 (8th Cir. 1979); *General Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 94 n.5 (1st Cir. 1977). See also *Treadway Cos., Inc.* v. *Care Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,603 (2d Cir. Aug. 12, 1980); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

The court's decision is also in agreement with the overwhelming majority of district court decisions. See *Kirsch Co.* v. *Bliss & Laughlin Industries, Inc.*, 495 F. Supp. 488, 490-492

2. The decision of the court of appeals also is consistent with this Court's recent decisions considering implied rights of action under federal statutes. In those decisions, the Court has instructed that the central inquiry in determining whether a private remedy exists under a statute not expressly providing for one is the intent of Congress. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688-689 (1979). The language of the statute, its legislative history, and the overall statutory scheme must be considered in discerning congressional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 16-22.

(W.D. Mich. 1980); *Wellman* v. *Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979); *W. A. Krueger Co.* v. *Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 803 (D. Neb. 1979); *Scott* v. *Multi-Amp Corp.*, 386 F. Supp. 44, 50 (D. N.J. 1974). See also *Lane Bryant, Inc.* v. *Hatleigh Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. June 9, 1980); *Brascan Ltd.* v. *Edper Equities Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979); *Transcon Lines* v. *A.G. Becker, Inc.*, 470 F. Supp. 356 (S.D.N.Y. 1979); *Cook United, Inc.* v. *Stockholders Protective Committee of Cook United, Inc.*, [1979] Fed. Sec. L. Rep. (CCH) ¶ 96,875 (S.D.N.Y. May 21, 1979); *S-G Securities, Inc.* v. *Fuqua Investment Co.*, 466 F. Supp. 1114, 1127-1128, 1132 (D. Mass. 1978); *Financial General Bankshares, Inc.* v. *Lance*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D. D.C. Apr. 1978); *Universal Container Corp.* v. *Horwitz*, [1977-1978] Fed. Sec. L. Rep. (CCH) ¶ 96,161 (S.D.N.Y. Sept. 6, 1977). Contra: *Gateway Industries, Inc.* v. *Agency Rent A Car, Inc.*, 495 F. Supp. 92 (N.D. Ill. 1980), appeal dismissed per stipulation, No. 80-1871 (7th Cir. Aug. 11, 1980); *Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, 494 F. Supp. 358 (E.D. Wis. 1980).

A central inquiry within this framework is identification of the persons who are the special beneficiaries of the statutory provision in question. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 689; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977); *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Section 13(d) states plainly that it was intended to confer a specific and narrowly delineated right on corporate issuers to receive accurate information about persons obtaining large blocks of their securities. The statute provides that any person who acquires more than five percent of specified classes of equity securities must "send to the issuer of the security at its principal executive office, by registered or certified mail" a disclosure statement containing accurate information as required by the Commission's rules. Thus, the statute, literally read, confers affirmative "federal rights in favor of private parties" (*Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 569)—*i.e.*, the right to receive the information required to be disclosed on SEC Schedule 13D.[4]

As this Court noted in *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690 & n.13, the existence of a class of specifically designated beneficiaries, appearing on the face of the statute, "has generally been the most accurate indicator of the propriety of implication of a cause of action." Moreover, in conferring affirmative rights on issuer corporations, Sec-

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[4] As the court of appeals recognized, the corporate recipient of the disclosure statement serves as a "conduit" providing information to shareholders. Armed with accurate information, public shareholders of the recipient corporation can make an informed response to any potential shift in control. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977).

tion 13(d) differs significantly from the two provisions of the federal securities laws that this Court has determined do not give rise to private causes of action. Thus, Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a) (considered in *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 569) is merely a "record keeping" provision. And while Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6 (considered in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 17, 19) creates "federal fiduciary standards" for investment advisers, that provision simply "proscribes certain conduct." Section 13(d), by contrast, vests in issuer corporations an affirmative right to receive the Schedule 13D disclosure statement, and therefore provides a predicate for a narrow equitable remedy (Pet. App. 16a-17a):

> We have already noted that the sole basis of standing in favor of the corporation itself is to enforce the statutory mandate to file a Schedule 13D, which is complete, accurate, truthful, and not misleading * * * [This] is solely the right of the corporation itself, and * * * that right is limited to equitable relief * * *.

That conclusion is supported by this Court's ruling in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 18-19, 24 n.14, that clients of investment advisers have a right of action to sue for equitable relief under Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-15. Here, as in *Transamerica*, "the statutory language itself fairly implies a right to specific and limited relief in a federal court." 444 U.S. at 18.

While the legislative history does not expressly discuss the question of private remedies under Section

13(d), that is not necessarily inconsistent with an intent on Congress' part to make such remedies available.[5] Congressional intent "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* 444 U.S. at 18. The legislative history of Section 13(d) supports the view that a private remedy was meant to be available. Congress passed the Williams Act "to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 35; *Rondeau* v. *Mosinee Paper Corp., supra,* 422 U.S. at 58.[6] In particular, Section 13(d) was intended to "alert the marketplace to every large, rapid aggregation or accumulation of securities * * * which might represent a potential shift in corporate control."[7]

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[5] In situations such as this, in which the statute clearly confers specific rights upon a class of persons, it is not necessary to show a specific intent to create a private cause of action, although an explicit purpose to deny a private action would be controlling. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 694.

[6] The Williams Act was intended to close a gap in the disclosure requirements of the securities laws. *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 26-27. Originally, the requirements of Section 13(d) were activated when a purchaser acquired more than ten percent of any class of securities covered by the statute. Section 13(d)(1) was amended as of December 22, 1970, to require the filing of a disclosure statement when the acquisition reached five percent. See Pub. L. No. 91-567, 84 Stat. 1497.

[7] *Treadway Cos., Inc.* v. *Care Corp., supra* [Current] Fed. Sec. L. Rep. (CCH) ¶97,603, at 98,209, quoting *GAF Corp.* v. *Milstein, supra,* 453 F.2d at 717. See also S. Rep. No.

Permitting corporate issuers to sue to obtain an accurate Schedule 13D, and to serve thereby as conduits for transmittal of information to their shareholders, is essential to ensure that material information is promptly disclosed as mandated by Congress.

While petitioners correctly assert (Pet. 13) that Congress, in passing the Williams Act, was careful to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" (*Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58-59), it does not follow that granting the issuer corporation a limited private remedy to obtain an accurate Schedule 13D would interfere with that purpose. To the contrary, a private remedy to secure the filing of an accurate disclosure statement is consistent with the kind of contest for control that Congress contemplated—a contest occurring in an environment of full and fair disclosure. The court below cautioned the district court against permitting litigation under Section 13(d) to become an instrument for harassment and delay. And as this Court observed in *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 42, "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given." Under these circumstances, there is no basis for the assertion that a limited equitable remedy to assure the filing of an accurate disclosure statement would undermine the statutory goal.[8]

550, 90th Cong., 1st Sess. 7 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8 (1968).

[8] The court's discussion in *Chris-Craft* of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e)—

3. Contrary to petitioner's suggestion (Pet. 12-13), recognition of a private right of action for equitable relief under Section 13(d) is not inappropriate in light of the express right of action for damages prescribed under Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78r(a). That Section provides a wholly different kind of relief for differently situated parties. Section 18(a) prescribes a money damages remedy for persons who purchase securities in reliance on materially false or misleading statements contained in documents required to be filed with the Commission. In *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 574, the Court declined to recognize a right of action for damages under Section 17(a) of the Act, stating that it was "extremely reluctant" to do so since the implied cause of action would be "significantly broader than the [express] remedy that Congress chose to provide" under Section 18(a). *Ibid.* In contrast to Section 17(a), however, Section 13(d) was enacted over 30 years after the passage of Section 18(a). Thus, analysis of Section 18(a) is of little utility in construing the scope of Section 13(d). See *Cannon* v. *University of Chicago, supra,* 441 U.S. at 698-699.

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another provision of the Williams Act concerned with fraud in connection with tender offers—is instructive here. While disapproving *damage* awards to disappointed tender offerors (who were not the beneficiaries of the statutory scheme), this Court observed that the goal of shareholder protection could best be achieved by "other, less drastic means more closely tailored to the precise congressional goal underlying the Williams Act." 430 U.S. at 40. The limited *equitable* remedy recognized in the present case meets this Court's requirement of a remedy "closely tailored" to the statutory purpose.

Moreover, unlike the damages remedy sought to be implied in *Touche Ross*, an equitable remedy under Section 13(d) to obtain "adequate information regarding the qualifications and intentions" of the acquiring party (*Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58) is not "broader" than the damages remedy prescribed under Section 18(a). To the contrary, an injunction is a narrow remedy designed to prevent future injury.[9] The essential function of an injunctive proceeding under Section 13(d) is to obtain accurate information and an opportunity to assess the plans of the acquiring party before investors purchase or sell securities of the issuer (*ibid.*). Thus, in contests for corporate control, "injunctive relief at an earlier stage of the contest is apt to be the most efficacious form of remedy." *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 40 n.26.[10] This consideration reinforces the conclusion of the court of appeals that the issuer corporation

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[9] Damage awards under Section 18 are inadequate to cure the effects of a statutory violation of Section 13(d) since "[b]y that time it will be too late to avoid the evils which the Williams Act is designed to eliminate." *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 113 (7th Cir. 1970).

[10] This Court observed in *Rondeau* v. *Mosinee Paper Corp.*, *supra*, that money damages would be an adequate remedy to protect the interests of shareholders who had sold their stock to the acquiring party at pre-disclosure prices. 422 U.S. at 59-60. The Court made this observation only after concluding that, because a "proper" schedule 13D already had been filed, there was no continuing likelihood of irreparable injury to shareholders. *Id.* at 59. In this case, in contrast, the crux of Dan River's claim is that a proper Schedule 13D has *never* been filed and that its shareholders are being harmed by the acquiring party's continuing failure to comply with the disclosure requirements of Section 13(d).

has a limited right of action to obtain equitable relief under Section 13(d).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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DECEMBER 1980

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[11] We disagree with petitioner's view (Pet. 14-15) that the decision of the court of appeals interferes with the district court's discretion to grant or withhold equitable relief. In *Rondeau,* this Court discussed the "sound judicial discretion" of the district court after the liability issues in the case had been resolved. In this case, in contrast, the court of appeals' remand order rested on its conclusion that the district court applied an erroneous legal standard in dismissing the complaint when genuine issues of fact remained to be resolved and discovery had not been conducted. The district court acted on the mistaken assumption that filing a Schedule 13D that "facially" meets the requirements of the statute is sufficient, despite "reasonable inferences in the record" casting doubt on the veracity and completeness of the disclosures that were made (Pet. App. 9a-10a, 17a-23a).

It is true that the court of appeals stated that the district court "may and should grant appropriate injunctive relief" if a violation ultimately is proven (Pet. App. 15a). In context, we understand this statement to mean that equitable relief is available to redress a violation, despite facial compliance with the statute, if liability is proven and the traditional prerequisites for such relief are present. As respondent concedes (Br. in Opp. 9), this could mean "no relief if none were appropriate under *Rondeau.*"

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